KOTHANDARAM APPALA NAIDU & ORS A

v.

PENTADBIR TANAH KUALA MUDA KEDAH DARUL AMAN & ORS

B

HIGH COURT MALAYA, ALOR SETAR
SEE MEE CHUN JC
[CIVIL SUIT NO: 21-09-2005]
30 SEPTEMBER 2010

C

LAND LAW: *Caveats - Private caveat - Cancellation of - Caveat entered by 1st plaintiff and extended by court pending disposal of suit - Caveat cancelled by 1st defendant before disposal of suit - Whether there was court order to cancel caveat - Order not produced in court as evidence - Whether 1st defendants acted dishonestly - Whether 2nd and 3rd defendants vicariously liable - Whether there was a dishonest act to deprive plaintiffs of their rights* D

TORT: *Conspiracy - Conspiracy to defraud - First plaintiff entered private caveat - Caveat extended by court pending disposal of a suit - Caveat cancelled by 1st defendant before disposal of suit - Representation by 4th defendant on existence of court order to cancel caveat - Court order not produced as evidence - Defendants claimed under misapprehension of existence of court order - Whether first defendant acted dishonestly - Whether 2nd and 3rd defendant vicariously liable - Whether 1st to 3rd defendants conspired with 4th defendant in cancelling caveat - Whether there was a dishonest act to deprive plaintiffs of their rights* E F

CIVIL PROCEDURE: *Trial - Procedure - Fourth defendant and his solicitor absent throughout proceeding - Plaintiff and other parties present - Court to hear testimony of all witnesses present before decision pronounced - Evidence presented must be accepted as true unless inherently implausible* G

The plaintiffs brought this claim against the defendants for cancelling a private caveat. The private caveat was entered by the 1st plaintiff and was extended by the court until the disposal of a suit. The 4th defendant, the proprietor of the land, had made an application to remove the caveat; his application was dismissed by the court. The defendants, save for the 4th defendant, claimed that they were under the misapprehension that there was a court order to remove the caveat and had proceeded to cancel the caveat based on the said order. They claimed that they acted in good faith and were confused and misrepresented by the 4th H I

defendant *ie*, that the caveat had been removed by the court. The issue to be determined was whether the 1st to the 3rd defendants *ie*, the Pentadbir Tanah Kuala Muda, Kedah, the Pentadbir Hakmilik Tanah Negeri Kedah and the Kerajaan Negeri Kedah respectively, had acted fraudulently and in conspiracy with the 4th defendant in cancelling the private caveat.

Held (allowing the plaintiffs' claim):

(1) From the facts, the private caveat was cancelled based on a court order of 25 February 1997. The suit was disposed on 26 January 2003. Therefore, the private caveat was in fact cancelled before the disposal of the suit hence making it in contravention of the court order. Furthermore, there was no court order for the removal of the caveat on 25 February 1997. Although, the defendants claimed that there was one, the purported court order was not produced in court. All of the above point with a high degree of probability towards fraud by the 1st defendant; it was a dishonest act to deprive the plaintiffs of their rights. The 2nd and 3rd defendants were vicariously liable.

(2) The defence of good faith could not stand since by merely looking at the purported court order as it was obvious that it was an application by the 4th defendant to remove the caveat.

(3) The 4th defendant, who filed the defence, was absent throughout the proceedings although he was duly notified by the plaintiffs. His counsel had also discharged himself. Where one party is present and the court is ready to hear the matter on merit, then the testimony of all the witnesses present has to be heard before a decision is pronounced. Unless the evidence was inherently implausible, the court would have to accept such evidence as true since no evidence to the contrary was adduced. In the absence of the 4th defendant, the evidence of the plaintiffs and the other three defendants were heard.

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Chu Choon Moi v. Nga Sew Tin [1985] 1 LNS 134 FC ***(refd)***

Dubai Aluminium Co Ltd v. Salmon and Others (Livingstone and Others, Third Parties [2003] 1 All ER 97 ***(refd)***

Guindarajoo Vegadason v. Satgunasingam Balasingam [2010] 6 CLJ 954 HC ***(refd)***
Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***
PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, ss. 5, 6

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 45, para 1527

For the plaintiff - Dato' V Muthusamy; M/s V Muthusamy & Assocs
For the defendant - Mohamed Faizal Mohamed Fedder (Masri Hj Azizan with him); State Legal Advisor

Reported by Melinda Robert

JUDGMENT

See Mee Chun JC:

Preliminary Issues

[1] Although the second to fifth plaintiffs did not enter the private caveat their rights have been substantially affected by its cancellation. They have an interest and a nexus between them and the defendants. They therefore have *locus standi* to bring this claim.

[2] The third to fifth plaintiffs also have the appropriate legal capacity.

(a) The third plaintiff (PW4) is the administrator of his late father's estate and was appointed by his siblings to represent them. He is in the process of applying for letters of administration. He would be in the position of administrator de son tort ie although not yet appointed but has taken it upon himself to discharge the duties of an administrator as such. Refer to *Guindarajoo Vegadason v. Satgunasingam Balasingam* [2010] 6 CLJ 954 which at p. 966 referred to *Dubai Aluminium Co Ltd v. Salmon and Others (Livingstone and Others, Third Parties* [2003] 1 All ER 97 where the House of

Lords defined a trustee de son tort "as a person who, though not appointed to be a trustee, nevertheless takes it upon himself to act as such and to discharge the duties of a trustee.". The principles of that case would also apply here.

(b) The fourth plaintiff had been authorized by the court to represent her husband (F21). This would be sufficient to show legal capacity. The fourth plaintiff's son (PW5) had testified on the agreement entered into by his late father and the fourth defendant. He was not testifying in the capacity of the fourth plaintiff.

(c) The fifth plaintiff (PW3) is the administrator of his father's estate in respect of Plots no. 4 and 6. This is evident from the grant of letters of administration (P16) which must be read in its totality, in particular the back of p. 34 where Plots no. 4 and 6 appear in the description of property.

[3] On the alleged non compliance of the plaintiffs of ss. 5 and 6 of the Government Proceedings Act 1956 in not naming a particular public officer it is sufficient that a public officer in this case *Pentadbir Tanah Kuala Muda* has been named. The case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 is a case where no public officer but only the Federal and State Governments had been cited thereby rendering neither the State nor the Federal Government capable of committing the pleaded acts. In this instance a public officer has been named.

Primary Issue

[4] The primary issue is whether the first defendant had acted fraudulently and in conspiracy with the fourth defendant in cancelling the private caveat entered by the first plaintiff and extended by the court until final disposal of a suit.

Fraud

[5] The law on fraud is clear. *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 2 MLJ 136 states at p. 138 that:

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean "actual fraud, ie dishonesty

> of some sort" for which the registered proprietor is a party or privy. Fraud implies a willful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of whatever he is entitled. ... Thus ... it was said that "if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ... .

[6] On degree of proof the then Supreme Court case of *Chu Choon Moi v. Nga Sew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34 at p. 38 stated as follows:

> We agree that fraud whether made in civil or criminal proceeding must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the Court or a prudent man considers its existence probable in the circumstances of the case.

Evidence On Fraud

[7] What is the evidence adduced on fraud?

[8] The relevant agreed facts are that the first plaintiff had entered a private caveat on 1 April 1976. This private caveat was extended by a court order dated 30 March 1980 until final disposal of suit no 138/1972. This was registered on 10 April 1982 as Presentation No. 215/1982 Extension of Caveat Vol. No. 10 Folio No. 41. On 4.2.1997 the fourth defendant filed an application to remove the caveat which was dismissed by the court on 14 June 1997.

[9] The particulars of fraud and conspiracy are as set forth in paras. 25(1) to (9) of the statement of claim. Essentially the fraud is that the first defendant had cancelled the private caveat in contravention of the court order dated 30 March 1980. The plaintiffs have also asserted that the first to third defendants claim that there were such court orders dated 30 October 1994 and 25 February 1997 which are fabricated.

[10] The defence of the first to third defendants is that they acted in good faith and were confused and misrepresented by the fourth defendant that the caveat had been cancelled by the court. The specific response to the plaintiffs' assertion that the fourth defendant's application on 4 February 1997 to remove the caveat had been dismissed on 14 July 1997 was that they were informed

by fourth defendant that the application of the plaintiffs to extend the caveat had been dismissed by the court. What they are saying is that they cancelled the caveat under the misapprehension that the caveat had been removed by the court. Although the dates of the court order differ *ie*, 25 February 1997 and 30 October 1994, it was eventually corrected to 25 February 1997. The defence remains that the caveat was cancelled pursuant to a court order. There are no two versions as contended by plaintiffs' counsel.

[11] The first to third defendants' sole witness was En Faisal Azli bin Ghazali (DW1), Assistant Land Administrator, Kuala Muda. His evidence was based on records as he assumed office in 2009. It is his evidence that the caveat was cancelled based on court order dated 25 February 1997 and registered as Persembahan No. 28/97 Vol. No. 3 Folio No. 76. No notice of cancellation was required as this was done pursuant to a court order. In cross examination he said there was an entry to the effect there was a court order. He would not know for a fact whether there was such an order. No such court order was produced.

Finding Of The Court

[12] It is self evident the private caveat was cancelled based on a court order of 25 February 1997 (D21). Civil suit no 138/1972 which was consolidated with suit no 188/1983 was disposed of on 26 January 2003 (P4). Hence the private caveat was cancelled before the disposal of suit no 138/1972 making it a contravention of the court order.

[13] There was never any court order of 25 February 1997 to remove the caveat. Most probably the court order was the application of the fourth defendant dated 4 February 1997 to remove the caveat (P23). This is because this is the closest date to the purported date of removal of the caveat by the court dated 25 February 1997. This is confirmed by the letters in P8(b), P8(c) and B85 where they show that what was given to plaintiffs' counsel as the court order was in fact the fourth defendant's application to remove the caveat.

[14] The other purported court order of 30 October 1994 never existed as evident by P8(b) where the land administrator's office confirmed acting on the purported order of 25 February 1997.

[15] No court order to remove the caveat was produced in court. A

[16] All these point with a high degree of probability towards fraud by the first defendant as it was a dishonest act to deprive the plaintiffs of their rights. The second and third defendants are vicariously liable. B

[17] Further the contents of P7, P8 and P9 which are the evidence on fraud and conspiracy were not disputed. The Court of Appeal case of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639 at p. 658 had this to say: C

> ... It is essential that a party's case be expressly put to his opponent's material witness when they are under cross examination. A failure in this respect may be treated as an abandonment of the pleaded case ... It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes. D

[18] The fraud was in conspiracy with the fourth defendant. According to *Halsbury's Laws of England* (vol 45, 4th edn) para. 1527: E

> In order to make out a case of conspiracy the plaintiff must establish an agreement between 2 or more persons, an agreement for the purpose of injuring the plaintiff and that acts done in execution of that agreement resulted in damage to the plaintiff. F

[19] The proof of such agreement is the first defendant attempting to pass off the application of the fourth defendant to remove the caveat as the court order.

[20] The defence of good faith cannot stand as merely by looking at the purported court order of 25 February 1997 it is obvious it was the application by the fourth defendant to remove the caveat. G

Absence Of Fourth Defendant

[21] The fourth defendant who had filed defence was absent throughout the proceedings. His counsel had discharged himself. The fourth defendant was aware of the proceedings having been duly notified by the plaintiffs' counsel. Where one party appears and the court is ready to hear the matter on its merits then the testimony of all the witnesses present must be heard before a decision is pronounced. Further unless the evidence is inherently H I

implausible the court will have to accept such evidence as true since no evidence to the contrary has been adduced (*Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381).

[22] In the absence of the fourth defendant, the evidence of the plaintiffs and first to third defendants were heard and my findings are as above.

Claim Amounts To Double Relief

[23] Counsel for first to third defendants in their written submission dated 25 July 2010 at para. 10.3 contended that the present claim amounted to double relief (tuntutan relief berganda) as the plaintiffs had earlier obtained specific performance against the fourth defendant in respect of the sale and purchase agreement giving rise to the caveat. This is irrelevant to the issue at hand which is whether the first to third defendants had acted fraudulently and in conspiracy with the fourth defendant in cancelling the caveat.

Conclusion

[24] For the above reasons, I allow the plaintiffs' claim in respect of prayer 28(1) and (2) of its statement of claim with costs and award general damages to be assessed. Costs and general damages as against all the defendants.